ABDUL RAHMAN v. ARIFFIN

[A.C.J. (Thomson J.) January 19, 1956]

[Ipoh — Civil Appeal No. 24 of 1955]

Contract — Bailment — Onus on bailee to show that loss or damage caused to the goods bailed was not attributable to his lack of care — Contract (Malay States) Ordinance, 1950, ss. 104 and 106.

This was a claim for the value of a buffalo which the plaintiff had entrusted to the defendant in accordance with an agreement between them under which the defendant was to look after the buffalo and was to share its produce in equal parts with the plaintiff. The learned Magistrate held that there was a contract of bailment of the buffalo but held that as the plaintiff had not established that the loss of the buffalo was through the neglect or default of the defendant, the bailee, he had no cause of action.

Held: the onus was on the defendant as bailee to show that the loss was not attributable to lack of care on his part and therefore the learned Magistrate was wrong in giving judgment for the defendant at the close of the case for the plaintiff.

Case referred to:—

(1) *Phipps v. New Claridge's Hotel (Ltd.)* 22 T.L.R. 49.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

Thomson J. (delivering oral judgment): — This appeal arises from a claim for the value of a buffalo which the appellant had entrusted to the respondent. There seems to be no question that the buffalo was handed to the respondent in accordance with an agreement between the parties under which the respondent was to look after the buffalo and was to share its produce in equal parts with the appellant.

The learned Magistrate held that that contract was what is known as a contract of bailment, and so much of the appeal as questions that decision of the learned Magistrate has in effect been abandoned. In my view the learned Magistrate was quite right on the point.

At some stage, again, I think this is common ground, the buffalo was lost. So much was clear from the evidence given by the appellant.

At the close of the appellant's case the learned Magistrate held, and here I quote his own words, "It was not established by the plaintiff that the loss was through the neglect or default of the defendant." On that he proceeded to hold that no cause of action had been made out by the appellant and dismissed the action.

Against that decision the appellant has now appealed.

I do not find it necessary to discuss the point at great length because in my opinion the law is clearly stated in the following passage from *Chitty on Contract* 20th Edn. p. 846:—

"In the case of loss or damage to goods bailed, the onus is on the bailee to show that the loss or damage was not attributable to any lack of care which by law is required of him."

On this point, I also refer to the case of *Phipps v. The New Claridge's Hotel (Ltd.)*[1] where the facts were very similar to those in the present case.

There is nothing inconsistent between the law as thus stated in *Chitty* and sections 104 and 106 of the Contracts Ordinance. The point is more one of onus than one of substantive law. It is true that the bailee is only responsible for the consequences of failure to observe the standard of care laid down by section 104 and there is no doubt that up to a point there is an onus upon any plaintiff which must be discharged. It seems to me, however, that once loss has been proved that onus has been discharged and the onus then shifts to the defendant to shew that the loss occurred in circumstances which shewed no lack of care on his part.

In the circumstances, I think the learned Magistrate was wrong in giving judgment for the defendant at the close of the case for the plaintiff.

There will have to be a new trial and there will be an order accordingly.

Costs of the appeal will abide the issue of the new trial.

Order accordingly.

Solicitors: *S. Seenivasagam & Sons.*

ARUNASALAM v. LETCHUMI (f)

[A.C.J. (Thomson J.) January 24, 1956]

[Ipoh — Civil Appeal No. 25 of 1955]

Moneylenders Ordinance, 1951 s. 27 — Attestation of promissory note — Necessity to call attesting witness — Evidence Ordinance, 1950, s. 68.

The appellant in this case was a licensed moneylender and claimed against the defendant, a female South Indian rubber tapper who did not understand the English language, on an alleged promissory note for $150. On the facts the learned Magistrate accepted the story of the defendant and rejected that of the plaintiff. He held further that as the promissory note sued on was a document which was required by law to be attested and as the attesting witness was not called to give evidence, it could not be used in evidence by reason of s.68 of the Evidence Ordinance.

Held: the promissory note in this case was required to be attested by s.27 of the Moneylenders Ordinance and that being so it was a document which could not be used until s.68 of the Evidence Ordinance was complied with.

CIVIL APPEAL.

M. S. Mahendran for the appellant.

Thomson J. : — This is an appeal from the Magistrate's Court at Taiping.

The appellant, who is a licensed moneylender, sued the respondent who is a female South Indian rubber tapper and who, on a finding of the Magistrate, does not understand the English language, on an alleged Promissory Note for $150. The Magistrate decided the case against the appellant and gave judgment for the defendant with costs. Against that decision the plaintiff has now appealed.

At the hearing of the appeal I took the view that it was entirely without merit but as the case raises a question of some considerable importance and, so far as I am aware, of novelty I reserved judgment.

The appellant's story was that on 7th March, 1955, he lent a sum of $150 to the respondent. A Promissory Note was drawn up in the English language bearing a form of certificate as required by section 27 of the Moneylenders Ordinance. The parties then proceeded to the house of Dr. Mohd. Ghows, a Justice of the Peace. Dr. Ghows explained the contents of the Promissory Note to the respondent and the sum of $150 was paid to her in his presence. The Note was executed by the parties and the statutory certificate was signed by Dr. Ghows. The Note, I should add, which was produced by the appellant, was in a printed form which has been commonly in use since the commencement of the present Moneylenders Ordinance and which, so far as I am able to advise myself, is unobjectionable. Dr. Ghows was not called as a witness.

The story of the defendant and her witnesses was that she had been in the employment of the appellant for some time, that she was indebted to him in the sum of $50, that after some discussion as to the amount of this indebtedness she affixed her thumb-print to a printed form similar to the Promissory Note sued on but in which the blanks had not been filled in, that she received no money, that she did not know Dr. Ghows and that she never went to his house at any time.

For reasons which he sets out at length in his admirable judgment and which impress me as both cogent and convincing the learned Magistrate accepted the story of the defendant and her witnesses and rejected that of the plaintiff. He went on, however, to say that in any event the Promissory Note sued on was a document which was required by law to be attested, that the attesting witness was not called to give evidence and that, therefore, by reason of section 68 of the Evidence Ordinance it could not be "used as evidence."

On reflection, I am satisfied that on this point the learned Magistrate is correct. Section 68 of the Evidence Ordinance provides that, subject to an exception which does not arise in the present case, if a document "is required by law to be attested" it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Section 27 of the Moneylenders Ordinance, 1951, provides that if a promissory note is taken as security for any loan and the borrower is a person not understanding the written language on such note "the note shall be attested" by one of a list of functionaries which includes Justices of the Peace. The note in question in the present case is clearly one which is required to be attested by section 27 of the Moneylenders Ordinance and that being so it was a document which could not be used as evidence until section 68 of the Evidence Ordinance was complied with. It is true, and counsel for the appellant tried to make something of this, that by reason of section 70 of the Evidence Ordinance compliance with section 68 is not necessary where a party to a document required by law to be attested admits its execution by himself. That, however, has no application to the present case for the respondent did not admit the execution of the Promissory Note. What she admitted was putting her thumb-print on a printed form containing blanks which had not been filled in.

The appeal is dismissed with costs.

Appeal dismissed.

ABDULLAH BIN AWANG BONGKOK v. PUBLIC PROSECUTOR

[C.A. (Mathew C.J., Whyatt C.J.(S) and Good J.) January 24, 1956]

[K.L. — F.M. Criminal Appeal No. 80 of 1955]

Evidence Ordinance, 1950, s. 24 — Confession recorded by Magistrate — Whether confession was made freely and voluntarily.

The appellant in this case was convicted of murder and sentenced to death. The only point which was argued was whether the confession made by the appellant to a Magistrate should have been admitted in evidence. While recording the memorandum of enquiry, the Magistrate asked a question and got an answer as follows: "Q: — Did anyone make you a promise that if you make a statement to a Magistrate that he would let you off easily? A: — One Malay police constable whose